BRIEF OF PETITIONER

Supreme Court of the United States

October Term, 1939

No. 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, *PETITIONER,*

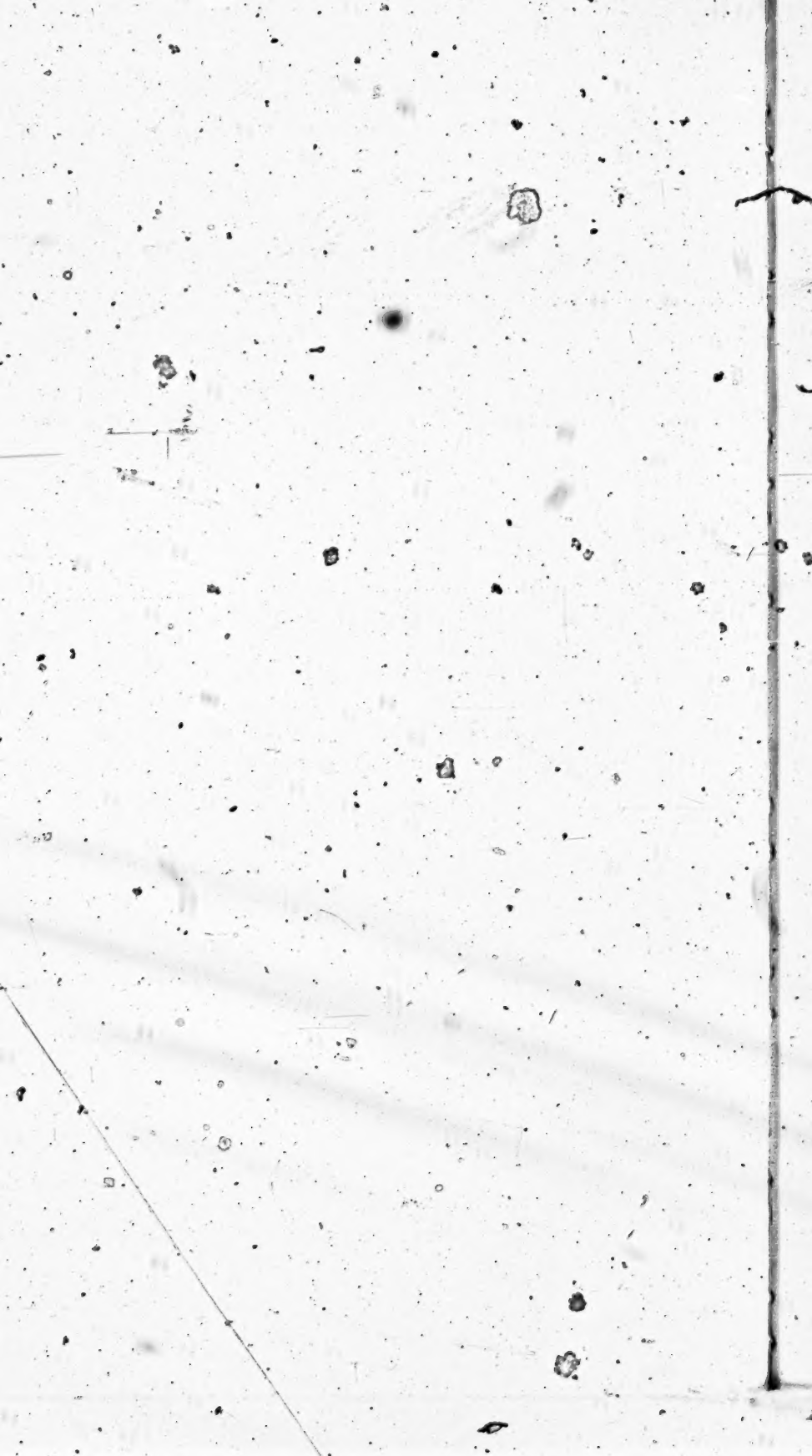
VS.

UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), *RESPONDENT.*

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,
Petitioner,
By THOMAS M. LILLARD,
Of Topeka, Kansas,
Counsel for Petitioner.

O. B. EIDSON,
DEAN SHRADER,
County Attorney of Jackson County, Kansas,
FLOYD W. HOBBS,
Of Counsel.

H. M. IVES & SONS, TOPEKA



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JURISDICTION

The jurisdiction of this court in this case is invoked under authority of the Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U.S.C.A. 347). Petition for *certiorari* under authority of the foregoing section was filed within time, and was granted by this court on April 17, 1939, the respondent having joined with the petitioner in a request upon the court that certiorari be granted.

STATEMENT OF THE CASE

The United States of America instituted this action on December 23, 1936, by a petition filed in the District Court of the United States for the District of Kansas (Tr. 1-5), under the direction of the Attorney General of the United States to recover a judgment against the Board of County Commissioners of Jackson County, Kansas, for a recovery of taxes and interest collected by said County during the years 1919 to 1933, inclusive, upon farm land in Kansas which had been allotted to the Indian M-Ko-Quah-Wah, Allottee No. 193, an incompetent Indian of the Prairie Band of Pottawatomie Indians. This land had been allotted under the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38, 25 U.S.C.A. 348). For the pertinent provisions of the Act in question see Appendix B to this brief.

The amount claimed in the petition so filed was $3,073.70, being the principal amount of taxes paid by the Indian Allottee during the years above referred to. The total amount of taxes actually paid to the County by the Allottee during the period in question amounted to $1,966.96. In addition to this, the petition claimed interest on the taxes paid in the amount of $1,106.74, which made up the total above stated. The District Court entered judgment in favor of the plaintiff in the amount of $3,277.49 (Tr. 12-13), which included interest up to the 17th day of September, 1937, the date of the rendition of the judgment, together with interest thereafter at the rate of six per cent per annum upon the total amount of the judgment until paid.

An appeal was perfected to the Circuit Court of Appeals for the Tenth Circuit. After full presentation and hearing of the appeal, the Circuit Court affirmed the judgment of the District Court, its opinion being set out on pages 48 to 62, inclusive, of the transcript. The judgment of the Circuit Court is found on page 63 of the transcript in this court. Petition for rehearing was filed within time (Tr. 63-64).

which was denied by the Circuit Court of Appeals on January 23, 1939. (Tr. 65). As stated hereinbefore, this court granted petition for *certiorari* on April 13, 1939 (Tr. 66-67), the Solicitor-General having joined with the petitioner in an application that petition for *certiorari* be granted.

The petitioner here does not challenge the correctness of the judgment of the courts below that the principal amount of the taxes paid by the Indian Allottee during the years in question should be recovered from the county, petitioner herein. The sole contention which we bring to the attention of this court is that the District Court and the Circuit Court of Appeals were in error in rendering judgment in favor of the United States on behalf of the Indian Allottee in question, and against the Board of County Commissioners of Jackson County, Kansas, for interest on the principal amount of the taxes collected from the Indian during the years in question, as shown by the journal entry of the trial court. (Tr. 12-18.)

The petition filed by the Government in the District Court (Tr. 1-5) alleges that the land in Jackson County was allotted to the Indian in question; that on August 15, 1893, a trust patent was issued to her covering the premises in question under the Fifth Section of the General Allotment Act (see Appendix B) hereinbefore referred to; that in accordance with said Allotment Act the trust patent so issued provided that the land should be held by the Government for a period of twenty-five years in trust for the sole benefit and use of the Indian or her heirs; that at the expiration of said period the United States would convey the land by patent to the Indian or her heirs in fee, discharged of said trust and free from all charges or encumbrances whatsoever.

The petition filed in the District Court by the Government further alleges that on April 17, 1918, a patent in fee was issued to the Indian in question without her consent, which on its face purported to convey the land in fee simple to her. The taxes sought to be recovered, as set out in the

petition of the Government, were those paid for the years 1919 to 1933, inclusive, in the total amount hereinbefore stated. For an itemized statement of the taxes collected by the petitioner, together with interest computed to September 1, 1936, see page 4 of the transcript.

The petition further alleges that the fee simple patent was cancelled by the Government under the authority of an Act of Congress approved February 26, 1927, 44 Stat. L. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. L. 1205 (25 U.S.C.A. 352a.) (For text of Act, see Appendix D.)

THE EVIDENCE

The evidence was that the taxes in question were paid by the allottee, her husband, or by the administrator of her husband's estate beginning with the year 1919 to and through the year 1933. (Tr. 27.) The Government has not at any time throughout this litigation contended that the taxes were paid by the allottee or on her behalf under formal protest as provided by the statutes of the State of Kansas. There was one payment made under protest on account of a school district levy (Tr. 27), but this could not be construed in any way as being a protest to the validity of the taxes on the grounds advanced by the Government in this case.

The evidence introduced on behalf of the Government shows that a trust patent was issued to the allottee by the Government on August 15, 1893. (Tr. 20-21.) This patent provided that the Government would hold the land in trust for the allottee for a period of 25 years; that at the expiration of that period the United States would convey the land by patent to the Indian, free and clear of any charge or encumbrances, but provided that the President of the United States might, in his discretion, extend the period. In December of 1917, during the twenty-fourth year of the trust period as contemplated by the trust patent above referred to, a Competency Commission went out to the Potta-

watomie Indian Reservation where the land in question was located in Kansas, and made an investigation as to the financial condition of the allottee in question, and the competency of herself and her husband. The report of this Commission directed to the Secretary of the Interior under date of December 29, 1917 (Tr. 22), shows that at that time the allottee and her husband had a well improved home, a large barn, wells, windmills, and other farm buildings; an automobile, ten or fifteen head of horses and mules, a large herd of cattle, including a bunch of thoroughbred Galloways. The Government officials making this investigation ended their report by saying:

> "They are considered very competent people. This allottee declined to sign an application, but is deemed to be fully competent to transact his own business without further Government supervision."

This advice was forwarded to the Secretary of the Interior, with recommendations that the Commissioner of the General Land Office should be directed to issue a patent in fee to the allottee in question "and that the issuance of the patent be made special." (Tr. 22.)

On February 13, 1918, still during the twenty-fifth year of the trust period above referred to, the Secretary of the Interior acted upon this recommendation by concurring with the Competency Commission, and directing the Commissioner of the General Land Office to issue a patent to the land in question to the allottee, and directing "that the issuance of this patent be made special." (Tr. 23.)

Pursuant to this direction from the Secretary of the Interior a fee patent was issued by the Government to the allottee in question on April 17, 1918, being duly signed on behalf of the President by his Secretary. (Tr. 23-24.)

It is to be remembered at this point that the original trust patent was issued on August 15, 1893, and that the 25-year period provided in such patent would expire on August 15,

1918. Hence, the patent just referred to, signed by President Wilson, being issued under special directions from the Assistant Secretary of the Interior, and dated April 17, 1918, was issued only four months prior to the full expiration of the 25-year period.

Thereafter, and notwithstanding the issuance of this patent, the President, on July 30, 1918, extended the trust period as provided in the trust patent for a period of ten years. (Tr. 21.) This was done apparently notwithstanding the fact that the same President had theretofore ended the trust period provisions in the trust patent by a special patent issued after full investigation at the direction of the Secretary of the Interior. Another executive order again extending the trust period in the original trust patent for an additional ten years was issued by President Coolidge on April 16, 1928. This was also done notwithstanding the special patent which had been issued by President Wilson just prior to the full expiration of the 25-year trust period. (Tr. 21.)

On May 8, 1906, Congress passed an Act (34 Stat. 182, 25 U. S. C. Sec. 349) which provided that at the expiration of the trust period, "and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348" (set out in Appendix C hereto), then and thereafter all restrictions as to taxation of the land in question should be removed.

On February 26, 1927, Congress passed another Act (c. 215, 44 Stat. 1247), as amended by the Act of February 21, 1931 (c. 271, 46 Stat. 1205, 25 U.S.C., Sec. 352a). This act is set out as Appendix D hereto. By this act the Secretary of the Interior was authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original trust patent or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or application of the allottee.

Acting pursuant to this act, the office of Indian Affairs recommended to the Secretary of the Interior that the patent issued by President Wilson on April 17, 1918, to the allottee in question should be cancelled under the provisions of the last referred to act. This recommendation was made on May 20, 1935. (Tr. 25.) The recommendation was approved by the Secretary of Interior, and an order was issued on May 31, 1935, cancelling the fee simple patent. (Tr. 25-26.)

The evidence shows that the county officials did not begin to levy taxes until the year 1919, which was the year following the time the fee patent was issued by President Wilson, and no taxes were levied or collected by the county officials after the fee patent was cancelled on May 31, 1935.

THE TREATY AND LAWS

The Treaty and Federal statutes under which the foregoing procedure was taken have been referred to in connection with the statement made concerning the evidence. Nothing, however, was said concerning the original treaty between the Government and the Pottawatomie Indian Tribe, and it is thought reference to that treaty and further reference to the statutes might be helpful to the Court.

The original Treaty between the Government and the Pottawatomie Indians is dated November 15, 1861 (12 Stat. 1191). For Articles 2 and 3 of this Treaty see appendix A. Article 2 of that Treaty provided for the selection and allotment, or assignment, to the Indians of tracts of land; that when such assignments had been made, certificates should issue to the Indians and the tracts should be set apart for the perpetual use of the land by the assignees and their heirs. The Treaty also provided:

> "Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of

the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided."

Article 3 of this same Treaty provided that at any time thereafter when the President of the United States should become satisfied that any allottee had become sufficiently intelligent to control his or her affairs, he might, at the request of the allottee, cause the land held by him or her to be patented in fee simple with power of alienation. This section also provided that:

"Thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

Thereafter, in 1887, Congress passed a general allotment act. (24 Stat. 38, 25 U.S.C.A. Sec. 348.) Section 5 of that act has been referred to hereinbefore as the section particularly pertinent to the present litigation, and is set out as Appendix B hereto. That section provides that upon the approval of the allotments the Secretary of the Interior should cause patents to issue therefor in the name of the allottees, which patents should declare that the United States would hold the land thus allotted for a period of 25 years for the sole use and benefit of the Indian allottee; that at the end of said period a patent should be given to the Indian in fee. It was provided that the President might in any case extend the trust period.

As we have particularly mentioned hereinbefore Congress thereafter, in February, 1927, passed an act which was amended on February, 1931, authorizing the Secretary of the Interior to cancel fee simple patents issued to Indian allottees under certain circumstances. (46 Stat. 1205, 25 U.S.C.A. Sec. 352a). This provision is set out as Appendix D hereto.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals below erred:

1. In holding that the United States of America on behalf of M-Ko-Quah-Wah could recover interest on taxes which she paid to Jackson County, Kansas, during the time she held a fee patent from the Government to the land which was the subject of the taxation, and such holding is contrary to the decisions of the Ninth Circuit Court of Appeals in cases practically identical in facts and circumstances.

2. In holding that the United States Government had the right to recover interest for an Indian allottee on taxes collected on Kansas land, which decision involves an important question of local law contrary to and in conflict with decisions of the Supreme Court of the State of Kansas.

SUMMARY OF LAW POINTS

I.

A County is a Political Subdivision of the State, Created for Strictly Governmental Purposes.

United States v. Nez Perce County, Idaho, 95 F. 2d 238.
Jackson County v. Kaul, 77 Kan. 715-717, 96 P. 45.
Seton v. Hoyt, 34 Or. 266, 55 P. 967, 43 L.R.A. 634, 75 Am. St. Rep. 641.

II.

A County as a Governmental Agency is Not Liable for Interest in the Absence of a Positive Statute So Requiring or an Express Agreement to Pay.

United States v. North Carolina, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336.
United States v. North American Transp. & Trading Co., 253 U.S. 330-336, 40 S. Ct. 518, 64 L. Ed. 935.
Seaboard Air Line R. Co. v. United States, 261 U.S. 299-304, 43 S. Ct. 354-355, 67 L. Ed. 664.
Glacier County, Montana, v. U. S., 99 F. 2d 733.
United States v. Lewis County, Idaho, 95 F. 2d 236.
United States v. Nez Perce County, Idaho, 95 F. 2d. 238.
United States v. Nez Perce County, Idaho, 95 F. 2d. 232.
Jackson County v. Kaul, 77 Kan. 715-717, 96 P. 45.
Salt House v. McPherson Co., 115 Kan. 668, 224 P. 70.
School Dist. v. County Commissioners, 127 Kan., 292, 273 P. 427.
Kittridge v. Boyde, 137 Kan. 241-243, 20 P. 2d. 811.
15 R.C.L. 17.

III.

In the Absence of a Strict Legal Right as by Force of Statute or Contract the Government May Not Under the Facts of This Case Demand Interest Payments on Collected Taxes from the County on Behalf of an Indian Allottee as Damages.

United States v. Nez Perce County, Idaho, 95 F. 2d. 238.
Glacier County Montana v. U. S., 99 F. 2d. 733.
U. S. v. Board of Co. Commissioners, Commanche County, Oklahoma, 6 F. Supp. 401.
U. S. v. Board of Co. Commissioners, Pawnee County, Oklahoma, 13 F. Supp. 641.

ARGUMENT

The Sole Question Presented to This Court for Its Decision is Whether Interest Can be Collected on Taxes Collected by a Kansas County from an Indian Allottee, the Attempt to Collect the Refund Being Made at a Time Long After the Taxes Had Been Paid and While the Allottee Held a Fee Patent from the Government to the Land: This in the Absence of Any State Statute or Contract of Any Kind Authorizing or Requiring the Payment of Such Interest.

The facts as set out in the statement of the case hereinbefore made should be kept in mind. While it is true that the fee patent issued by President Wilson to the allottee in question on April 17, 1918, was issued without the consent of the allottee as provided in the treaty (Appendix A), nevertheless it was issued after a full and complete investigation by a Competency Commission. The report of this Commission was sent to the office of the Secretary of the Interior, where the report of the Commission was approved, and request was sent to the General Land office that a fee patent be issued to the allottee, which was done. That patent which was described as "special" in character stood unchallenged until the Act of February 26, 1927, when, under the provisions of the Act passed on that date (44 Stat. 1247), and as amended in 1931 (46 Stat. 1205) (see Appendix D hereto), and, for some time additional, until May 20, 1935, for the first time the Secretary of Interior took steps to cancel the patent of April 17, 1918. As appears from the statement of facts, the county collected taxes only for the years 1919 to 1933, inclusive. So that during the time of this patent, which so far as the county is concerned, was not at law challengeable, the county had every apparent right to collect taxes from the Indian. If there was any mistake of any kind in issuing the patent, or if there was any laches in attempting to secure a refund of the taxes, it was on the part of the Government, and the

government officials. The county officials were fully warranted in thinking that the land was subject to taxation from the time the patent was issued in 1918 up until the time the Government, acting under the long subsequent Act of Congress, cancelled it. The sole basis upon which the authorities hold that such taxes must be refunded to the Indian allottee is that they were collected during the time of the existence of a patent to the allottee which had been issued without his or her request. Is it not fair to inquire how the county should know whether or not the allottee had made a request for the issuance of the fee patent? Was not the county warranted in assuming when the government of the United States issued a patent to an humble Indian allottee, who under the provisions of the statute was a ward of the government, that the government had taken every statutory precaution to protect the rights of the Indian? Can it reasonably be said that it was the duty of the county in each case of the many Indian allottees within its boundaries to make an inspection of the records at Washington to ascertain if every detailed step of the necessary procedure for the protection of the rights of the Indian in connection with the issuance of a fee patent had been taken? The query indicates the answer; which is, that the county was fully warranted in assuming that the government, the trustee of the rights of the Indian allottee, had taken all essential steps prior to the time of the issuance of the patent. For the government to now come back on the county long years after the taxes had been collected, and speaking on behalf of the allottee, attempt to collect interest on payments of taxes which had been assessed in good faith by the county in reliance upon a fee simple patent issued by the government to the allottee, is to place an illegal as well as an unwarranted and unwarrantable burden on the county.

Article 3 of the Treaty between the Government of the United States and the Indians provided in part:

"Thereafter the land so patented to them shall be subject to levy, taxation and sale, in like manner with the property of other citizens."

It is reasonable to contend that the county taxing officials being advised that a patent had been issued by the government, were fully warranted in assuming that the patent had been properly issued, and in making collection of taxes until they were advised to the contrary. In such circumstances, under the law, interest is not a valid item to be recovered.

With this brief statement of the facts made for the purpose of showing clearly that all error and laches in connection with the collection and refund of the taxes was upon the government, we turn to a discussion of the law questions involved.

There is no statute in the State of Kansas which authorizes the collection of interest from a county. The Kansas Supreme Court holds that a county is a political subdivision of the State.

The Supreme Court of the State of Kansas in the case of *Jackson County v. Kaul*, 77 Kan. 717, 96 P. 45, held as follows, as shown by the syllabus of the case, as prepared by the Court:

"The general interest statute allowing creditors to receive in the absence of contract, interest upon money after it becomes due cannot be interpreted to impose a liability upon a county, which is a political subdivision of the state, organized for purely governmental purposes and endowed with *quasi*-corporate powers only; and, in an action against county officers to recover taxes wrongfully exacted over the protest of the taxpayer and through the compulsion of a tax warrant, interest on the money from the time it was paid (it then being due) cannot be recovered."

In the opinion, referring to the general statute of the State of Kansas which permits creditors to receive interest

at the rate of six per cent per annum when no other rate of interest is agreed upon, for any money after it becomes due (Sec. 41-101, G. S. Kans. 1935), the court said:

"The word 'creditors' is here used in the broad sense of those who have the legal right to demand and receive the payment of money, and includes the plaintiff, in the transaction under investigation. The money having been wrongfully extorted from the plaintiff by the threatened seizure of his property under the tax warrant then in the sheriff's hands for execution, the county had no right to retain it for a single day. It owed the plaintiff the duty to make restitution at once. (See 22 Cyc. 1506.) No demand was necessary, because the money had been exacted over the plaintiff's protest and denial of liability. Therefore the money was 'due' as soon as the county had taken it.

"So far the statute has been looked at from the creditor's side. Considered from the viewpoint of the debtor, it imposes a duty and a liability outside of contract which would not otherwise exist. Do its merely general terms extend to counties? The general rule that the state is not bound by statutes limiting rights and imposing burdens unless it be expressly named or be intended by necessary implication is familiar. (*The State v. Book Co.*, 69 Kan. 1, 24, 76 Pac. 411, and authorities there cited.) To bind the state by an implication it must be one that is unavoidable. If there be a doubt upon the subject, that doubt must be resolved in favor of the state. (*The State v. School District*, 34 Kan. 237, 242, 8 Pac. 208.)

"Counties are mere political subdivisions of the state. (*Commissioners of Shawnee County v. Carter*, 2 Kan. 115.) They are mere instrumentalities of the state in the exercise of its governmental functions, and are given corporate power only so far as may be necessary to aid those functions. They are only *quasi*-corporations (*Comm'rs of Neosho Co. v. Stoddart*, 13 Kan. 207, 210; *Freeland v. Stillman*, 49 Kan. 197, 207, 30 Pac. 235; *In re Dalton*, 61 Kan. 257, 264, 59 Pac. 336, 47 L.R.A. 380; *The State v. Wilson*, 65 Kan. 237, 238, 69 Pac. 172), and

are clearly distinguished from municipal organizations like cities, which are given far greater powers and are endowed with much larger measures of corporate life. (1 Dill. Mun. Corp., 4th ed., No. 25; 11 Cyc. 341 *et seq.*) This suit can be maintained only because it relates to a subject which falls strictly within the limits of expressly granted authority. If it does not, the county cannot be sued any more than the state itself. When the statutes have made no distinction a county is entitled to the same privileges and immunities as the state."

As indicated, the collection of interest from the county was denied. As stated above, there is no other statute in Kansas which evidences the consent of that state to a recovery of interest upon tax money which has been collected erroneously.

In the case of *Salthouse v. McPherson County*, 115 Kans. 668, 224 Pac. 70, it is held:

"A judgment against a county in an action for the repayment of a void tax does not bear interest, the statute providing in general terms that judgments shall bear interest not applying where the state or county is the debtor."

In the opinion, 15 R.C.L., page 17, is cited. This text reads as follows:

"It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority. This principle applies to bonds, claims, judgments, and warrants. The theory upon which the rule is based is that whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. The apparently fav-

ored position of the government in this respect has been declared to be demanded by public policy. A county is generally regarded as but an arm or agent of the state, and not liable for interest, in the absence of an express agreement to pay it."

This rule is also followed in the case of *School District v. County Commissioners*, 127 Kan. 292, 273 Pac. 427, where it was held:

"Interest may not be recovered from a county except through express provision of statute."

This, then, is the rule in Kansas concerning the collection of interest from counties, which, as is demonstrated by the case of *Jackson County v. Kaul, supra*, are regarded as instrumentalities of the state. The ruling of the highest court in Kansas is to the effect that there is no applicable statute in Kansas which authorizes the collection of interest on judgments for the refund of tax money erroneously collected.

A similar situation as to law exists in the State of Idaho. In that state there is a statute which allows interest on taxes refunded after erroneous collection, but there is no statute of that state which evidences the consent of the state to a recovery of interest in a case such as is presented here. Under such a state of facts and circumstances, the United States Circuit Court of Appeals for the Ninth Circuit held that interest could not be recovered by the United States on behalf of an Indian ward living in Idaho. The facts there were practically identical to the facts in the present case. See *United States v. Nez Perce County, Idaho*, 95 F. 2d. 232. On page 236 of the opinion in that case the following appears:

"The recovery of interest on the amounts paid as taxes should not be allowed. *Interest may not be recovered upon money due from the sovereign unless some positive statute or contract of the state evidences its consent to pay it. United States v. North Carolina*, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336; *United States v. North*

American Transp. & Trading Co., 253 U.S. 330, 336, 40 S. Ct. 518, 64 L. Ed. 935; *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664. The county is a political subdivision of the state, and as such would seem to be entitled to this form of immunity. While the Code provision (section 61-1902, Idaho Code 1932) allows interest on taxes refunded after erroneous collection, the statute has no application in suits for refund brought in the federal courts. We are not aware of any statute of the State of Idaho which evidences the consent of that state to a recovery of interest in a situation such as the one presented here." (Italics ours.)

A rehearing was granted in that case on the sole contention that the court committed error in denying to the Government the recovery of interest. The opinion denying a rehearing is reported in 95 F. 2d 238, beginning on page 239 the court uses the following language:

"Unless the government is here entitled to interest as a strict matter of legal right, as by force of statute or contract, it is in no position to demand interest as damages. Its situation in that respect is conspicuously lacking in equity. The amended bills in these cases were filed in September, 1935. This was nine or ten years after the last payment of taxes had been made by the Indians, and the payments themselves had extended over a prior period of four or five years. Thus interest is sought on payments made as long as fourteen years before the commencement of the suits, and in no instance has the delay in seeking recovery been less than nine years. These delays are in no manner traceable to fault on the part of the counties or their governing officials, but are due to inexcusable laches on the part of the government itself. Again, the counties were in no way responsible for the issuance of the fee patents to the Indians in the first place. This was an act of the government itself, occasioned by facts and circumstances peculiarly within the knowledge of those representing it. The local authorities had a right to rely upon the

conduct of the government in the issuance of the patents, and were by this conduct induced to believe that the lands were subject to tax. The good faith of the counties and of their officers and governing boards is not open to question. For many years their budgets were formulated and their levies were fixed on the assumption—certainly not an unreasonable one—that these patented lands were part of the whole body of property subject to tax. Were the rights of the United States alone to be considered in these cases, its conduct might properly be held to estop it from any recovery at all. Nor, as indicated in the original opinions, is there a showing in either case that the Indian paid the taxes under protest. We have held that the United States is not precluded on this account from recovering the principal of the tax; but it does not follow that the Indians, having paid the taxes without protest, are themselves equitably entitled to interest by way of damages because of the retention of the moneys so paid. Nor is there any showing that the counties have earned or received interest on the moneys illegally exacted.

"Under all the circumstances, it is clear that the government is entitled to no more than a refund of the principal of these payments. The allowance of interest, even if normally recoverable, would be an abuse of discretion."

In the present case, the petition of the Government was filed on December 23, 1936, fifteen years after the first payment of taxes was made, and more than two years after the last item of taxes had been paid. Thus interest is sought on payments made as long as fifteen years before the commencement of the suit. As in the opinion last above quoted from, the delay in attempting to collect the taxes is in no manner traceable to fault on the part of the county or its officers, but is due alone to the laches on the part of the Government. Also, as in the foregoing case, the county here was in no way responsible for the issuance of the fee patent to the Indian allottee. That was an act of the Government.

the plaintiff in the case, occasioned and prompted by facts and circumstances which were peculiarly within the knowledge of the Government officials.

We submit the logic of the court in the above case, where it holds that under such a situation the local authorities had a right to rely upon the conduct of the Government in the issuance of the patent and that they are warranted in believing the lands were properly taxable, is sound. There was no evidence in this case which in any way questioned the good faith of the county officers, and there is nothing to show that they were arbitrary or unreasonable in making the tax levies against the property of the Indian in question. As in the foregoing case, they undoubtedly made their budgets and the levies were fixed upon the very reasonable assumption that these lands having been patented in fee by the Government were subject to taxation. There is no showing in the case that the county has ever received interest on the tax moneys collected from the allottee in question. In fact, the evidence is directly to the contrary, in that it shows the county officials largely disbursed the money to state, townships and school districts, the county having been the collecting agency for those branches of the state government. In such a situation, under the authority of the case last cited, interest may not be collected in the nature of damages, even in an action by the government. (*Redfield v. Bartels*, 139 U. S. 694-701, 11 S. Ct. 683-686, 35 L. Ed. 310. *Sanborn v. U. S.*, 135 U. S. 271, 281, 10 S. Ct. 812, 34 L. Ed. 112.)

There are many Indians in Jackson County, Kansas, for whom the Government has not yet filed suit. If the interest rule as announced and found by the Circuit Court of Appeals for the Tenth Circuit is permitted to stand, many other large items of interest of this character will be charged to, and collected from Jackson County, Kansas. The county is rural in its characteristics. The farmers and few business men residing therein are in very low financial condition. If these citizens are required to pay interest on these ancient

tax levies, which were occasioned by errors on the part of the Government in the issuance of fee patents to Indians, an extraordinary and unreasonable additional financial burden will be cast upon the Kansas citizens to the unreasonable advantage of Indian allottees. So far as the record in this case is concerned, the Indian here involved was, and is, financially well fixed. She was found by the Competency Commission sent out by the Government to be fully competent to handle her own affairs.

The Circuit Court of Appeals for the Tenth Circuit in the present case in its opinion (Tr. 49-62) cites authorities which are not appropriate to the conclusion ultimately reached by the court on the question of interest. Condemnation cases, and cases where food, fuel and supplies were requisitioned by the government are cited. But the authorities make a distinction between cases where property has been taken and compensation is claimed under the Fifth Amendment to the United States Constitution, and cases in which refunds of tax moneys are sought. See *Flemming v. County Commissioners*, 119 Kan. 598, 602, 240 Pac. 591; *Seaboard Air Line R. Co. v. U. S.*, 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664.

In the opinion in the present case the Circuit Court of Appeals cites Section 34 of the Federal Judiciary Act of 1789, 28 U.S.C.A., Sec. 851, which provides that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, the inference from such citation being that the rights in question in the present action are governed by provisions of the Federal Constitution, treaties or statutes. However, there are no constitutional provisions or statutes, or provisions of the treaty involved in the present case (Articles 2 and 3 of Treaty of November 15, 1861 [12 Stat. 1191. See Appendix A]) which require the payment of interest by states or subdivisions of

states where taxes are erroneously collected. We are conceding the correctness of the opinion of the District Court in granting a refund of the principal amount of taxes paid. That is as much as the treaty involved in this case contemplates. It simply says that the land shall be free from taxation. If the taxes are refunded, it will be free from taxation. There is nothing in the treaty which says that interest may also be charged. The Circuit Court of Appeals in the opinion in the present case attempts to distinguish the case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 787, by referring particularly to the exception as announced in the Federal Judiciary Act referred to above. The quotation in the opinion from the Erie case in that respect is as follows:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. * * * There is no federal general common law."

Apparently the Circuit Court of Appeals takes the view that the exception just quoted fits the present situation, but there are no federal constitutional provisions or federal statutes which authorize the collection of interest in cases of this character. From this it is apparent that the conclusion of the Tenth Circuit Court of Appeals in support of its decision as to the interest item is not sustained by the clear logic and reasoning that was adduced by the Ninth Circuit Court of appeals in the Idaho and Montana cases above referred to.

As a matter of fact, the judgment of the Circuit Court of Appeals for the Tenth Circuit in this case does not even agree with two prior judgments in almost identical cases as decided by District Judges within the same Circuit. In the case of *United States v. Board of Commissioners of Comanche County, Oklahoma*, 6 F. Supp. 401, District Judge Vaught decided in a case almost identical in its facts with the case now before the court that interest could not be recovered on

the taxes sued for. The taxes in that case were paid under protest. The court in that opinion, on page 403, states:

> "Where taxes are paid under protest, the collecting authority can only hold them in trust, and since Comanche County would be regarded in this case as a trustee, this court knows of no provision for the payment of interest except by taking the interest from some other fund whose application had been provided by statute."

Judgment was thereupon entered for the amount of the taxes without interest.

Later, the District Court of Oklahoma in the case of *United States v. Board of County Commissioners of Pawnee County, Oklahoma*, 13 F. Supp. 641, in an opinion written by Judge Kennamer, reached a conclusion in another case exactly in line with the case now before this court, that interest could not be collected. The taxes in that case were not paid under formal protest, but the court held that the judgment for the Indian plaintiff should not carry interest.

These decisions are in line with the case of *Kittredge v. Boyd*, 137 Kan. 241, 20 P. 2d. 811. Beginning on page 243 of the opinion, it is said:

> "That is the question whether interest should be paid on the protested sums during the time the state treasurer has held them pending an authoritative adjudication on the legality of the statute. In our opinion the state treasurer served as official stakeholder for all parties concerned. He has no fund to pay interest. While we have held that plaintiffs had no adequate remedy at law, and in consequence they could rightfully bring mandamus in these cases, mandamus was not the only extraordinary procedural redress—an injunction or mandatory injunctive proceeding in the district court, and could thereby have procured an adjudication on the state's claim to these illegal tax exactions without having paid over the money at all. The procedure they did follow was simpler and more expeditious, but it does not entitle them to interest on their funds while they have been in the hands of the state treasurer."

Thus it is that as against cases of exact similarity the decision here of the Circuit Court of Appeals for the Tenth Circuit stands out alone, and unsupported by other federal authorities. The court was clearly in error in holding that interest charges could be properly collected on the taxes paid by the Indian allottee.

Another very late case by the Ninth Circuit Court of Appeals where the facts are practically identical with the facts in the present case is that of *Glacier County, Montana, v. United States*, 99 F. 2d 733. That was an action by the Government on behalf of an Indian ward to recover taxes which had been assessed and collected during the time when the trust period as provided by the General Allotment Act of 1887 was still running. The court adhered to its earlier decisions cited hereinbefore in holding that while the taxes should be refunded to the Indian, interest could not be collected from the County. This decision was handed down on October 15, 1938, indicating the clear intent of the United States Circuit Court of Appeals for the Ninth Circuit to adhere to its earlier decisions, and to regard the holding of no interest liability as established law.

We submit:

First: The Circuit Court of Appeals for the Tenth Circuit has rendered a decision in the present case directly in conflict and irreconcilable to the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *United States v. Nez Perce County, Idaho*, and *United States v. Lewis County, Idaho, supra*, where the identical question as to the right of recovery of interest was involved. The opinion of the Tenth Circuit Court of Appeals requires the county to pay interest on tax moneys, some of which was collected as much as fifteen years prior to the date of the bringing of the suit. The total interest charges amount to almost as much as the principal amount of the taxes paid.

The opinion of the Ninth Circuit Court of Appeals holds that outside and beyond the fact that interest may not be collected as a matter of law, to require such a payment would work a grave inequity against the county and that interest may not therefore be collected as damages. Thus there is a direct conflict; and it is apparent that the Circuit Court of Appeals for the Ninth Circuit reached the correct result.

Second: The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case requiring the payment of interest is a decision on an important question of local law, which is contrary to and in conflict with the laws of the State of Kansas in which the land in question is situated, and where the case was filed and tried in the Federal District Court. The rule announced in the case of *Erie R. Co. v. Tompkins, supia,* requires that the law of the state must be applied where the Federal Constitution, Federal statutes or Federal Treaties do not provide to the contrary. We submit the rule announced by the state court as shown heretofore is not contradictory to any provisions of the Federal Constitution, Federal Statutes or of any Federal Treaty involved in this case and that it should control.

CONCLUSION

We submit that we have demonstrated the correctness of the conclusions of law, as contained in the opinions of the Ninth Circuit Court of Appeals, that it is illegal and unlawful to now attempt to require the petitioner here to pay interest on taxes collected many years ago in full good faith. Over and above this, the case presents a serious situation to the petitioner, a rural municipality, whose indebtedness to other Indians will be nearly doubled if the erroneous ruling announced by the Tenth Circuit Court of Appeals is adhered to. To require the payment of interest would work a grave inequity inasmuch as the county was misled by acts on the part of the government in issuing a fee patent which stood

unchallenged and uncancelled until after the last portion of the taxes in question had been collected.

The Indian allottee in this case, as found by the Competency Commission, was capable, both financially and intellectually, to attend to her own affairs. Although she was receiving all the benefits of county and state government, she avoided the payment of any taxes by the simple expedient of refusing to request the issuance by the government of a fee patent to her. Her testimony indicates that she was clearly fearful that if she made such a request her property would be subjected to taxes, although she was fully able to pay all the taxes assessed. This demonstrates how very unfair it is that she should recover more than the amount of the taxes which were reasonably assessed against her, in view of the acts of the government officials.

It is, therefore, respectfully submitted that the decisions of the Tenth Circuit Court of Appeals in this case should be reversed as to the collection of the interest on the tax money only, and that the views and conclusions of the Ninth Circuit Court of Appeals, as shown by cited cases, should be upheld.

Respectfully submitted,

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,
Petitioner,
By THOMAS M. LILLARD,
Counsel for Petitioner.

O. B. EIDSON,
DEAN SHRADER,
FLOYD W. HOBBS,
Of Counsel.

APPENDIX

A

Articles 2 and 3 of the Treaty of November 15, 1861 (12 Stat. 1191):

ARTICLE 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and head-men, respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head-man, one-half section; to each other head of a family, one-quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or

to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ARTICLE 3. At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee-simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

B

Section 5 of the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38; 25 U. S. C., Sec. 348):

Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 by the Secretary of

the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of this decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. * * *

C

Act of May 8, 1906, c. 2348 (34 Stat. 182, 25 U. S. C., Sec. 349):

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; * * * and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed * * *.

D

Act of February 26, 1927, c. 215 (44 Stat. 1247) as amended by the Act of February 21, 1931, c. 271 (46 Stat. 1205, 25 U. S. C., Sec. 352):

> The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee

or by his heirs: *Provided,* That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also,* That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent has never been issued.